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NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT M. CARSWELL, JR.,
PETITIONER

v.

JOHN M. MILGRIM,
DENNIS HILL
and
W. H. BERGER, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

ROBERT M. CARSWELL, JR.
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Tel: (703) 356-9296

PETITIONER - Pro se

QUESTIONS PRESENTED FOR REVIEW

1. Where a demurrer filed in the court of first instance admits that the respondents are knowingly, intentionally and without cause or justification abusing their office and power as sanitarians of the county health department for and unlawful and improper purpose, to vex, harass and annoy petitioner, and that court sustains said demurrer with prejudice, denying petitioner a remedy and leaving him subject to the penal clause of the pertinent county code under which respondents purport to act, is this a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, depriving petitioner of his property without due process of law ?

2. If in the above situation the "pertinent county code", with its penal clause, patently fails to provide, with respect to alleged or purported violations of said code, (1) notice to the affected party; (2) a hearing for the affected party; (3) a review of any administrative determination made under said code; and (4) an appeal to a judicial court, does such code violate the due process of law clause of the Fourteenth Amendment to the United States Constitution, so that any action purported to be taken under its authority without (1) notice, (2)

hearing, (3) review, and (4) appeal would be null and void ?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF VIRGINIA

JOHN M. MILGRIM
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Fairfax County Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

DENNIS HILL
Senior Sanitarian
Fairfax County Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

W. H. BERGER
Supervising Sanitarian
Environmental Services Section
Fairfax County Health Department
4080 Chain Bridge Road
Fairfax, Virginia 22030

An additional party to the underlying suit is interested in this petition, although he was not a party to the Petition for Appeal heard in the Supreme Court of Virginia:

(Defendant) Stephen S. Murray
855 Dolley Madison Boulevard
McLean, Virginia 22101

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AUTHORITIES

Federal cases:

Noval Goss et al v. Eileen Lopez et al. (1975) 419 US 565, 42 Led2d 725, 95 S. Ct. 729.

Mullane v. Central Hanover Trust Co. (1950) 339 US 306, 94 Led 865, 70 S. Ct. 652.

Baldwin v. Hale (1864) 1 Wall 223, 233, 17 Led 531.

Yick Wo v. Hopkins, 118 US 356, 6 S. Ct. 1064, 30 Led 220.

Virginia cases:

Violett's Heirs v. City Council of Alexandria (1896) 92 Va. 561, 23 S.E. 909, 31 LRA 382, 53 Am. St. Rep. 825.

Assaid v. City of Roanoke (1942) 179 Va. 47, 18 S.E.2d 287, at 288.

Thompson v. Smith (1930) 155 Va. 367, 154 S.E. 579, 71 ALR 604.

Texts:

16A CJS Section 568 at page 556.

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PETITION FOR WRIT OF CERTIORARI TO
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- -

The petitioner, Robert M. Carswell, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered on March 17, 1982.

OPINION BELOW

On March 17, 1982, the Supreme Court of Virginia entered its opinion refusing petitioner's Petition for Appeal from the order of the Circuit Court of Fairfax County, Virginia, sustaining a demurrer to petitioner's Second Amended Complaint in the underlying case brought before said court. A copy of that opinion is attached as Appendix A.

JURISDICTION

On March 17, 1982, the Supreme Court of Virginia entered judgment refusing petitioner's Petition for Appeal. This is a final judgment on the federal issue. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . . .

ORDINANCE INVOLVED

Chapter 68, Fairfax County Code, Fairfax County, Virginia. Pertinent sections are set forth as Appendix G.

STATEMENT OF THE CASE

The underlying case involves a suit for damages brought by Carswell against respondents in their individual capacities and not as agents, officers and employees of the Commonwealth of Virginia and/or Fairfax County. Two other defendants were also named; the demurrer of Falck was sustained with prejudice; the case against the other had a trial date set but your petitioner moved for a voluntary non-suit at the time when that defendant (Stephen S. Murray) had suffered a heart attack. The suit against Murray has been renewed, the complaint having been filed in the Circuit Court of Fairfax County, Virginia, on June 9, 1982, prior to filing this petition.

Respondents are sanitarians employed at the Fairfax County Health Department. They are being suid for, and by their demurrer admit, abusing the power of their office, while purporting to act for the government of the Commonwealth of Virginia, by intentionally, knowingly and without cause vexing, harassing and annoying Carswell in their unfounded efforts to force him to cease and desist from using the septic system serving his residence in Fairfax County, Virginia; said septic system has never been in malfunction.

Their actions finding said septic system to be in malfunction are taken for an improper and unlawful purpose, to hide their negligence in granting a permit to Defendant Murray (not a respondent in this petition) to relocate and drill a potable water well on his property too close to the drainfields of the septic system serving Carswell's residence. This violated Section 70-1-11 of the Fairfax County Code (Appendix H). Defendant Murray knowingly installed this potable water well in violation of said county code, and then he made an unfounded report to the respondents of a malfunction of the septic system serving Carswell's residence. He is being sued for this act, which directly and foreseeably resulted in the actions of respondents, for which they are also being sued.

Respondents were/are acting under the authority of Chapter 68 of the Fairfax County Code (Appendix G), which formed pages 67-80, inclusive, of the Record on Appeal in the Supreme Court of Virginia. It contains a penalty clause which reads as follows:

> Section 68-1-26. Prosecution.
>
> Whoever violates any provision of this Article, by doing a prohibited act, or failing to perform a required act, or failing to perfomr permitted acts in the prescribed

> manner shall be deemed guilty of a misdemeanor and shall, upon conviction, be punishable by imprisonment not to exceed thirty (3) days or by fine not to exceed One Thousand ($1,000.00) or both. Each day violation of this Article shall continue shall constitute a separate offense.

Respondents' demurrer to Carswell's second amended complaint was sustained with prejudice on April 8, 1981, the court of first instance refusing to accept a suit for "abuse of power". That court did not specifically decide that Carswell's complaint failed to state a cause of action (see Appendix E for the alleged facts admitted by respondents' demurrer - the court's refusal to grant a remedy is astounding under these admissions 1); rather, that court could not find a category of actions in which to place this type of suit. Carswell argued that an administrative process under Chapter 68 was involved, which was admittedly being abused by respondents, and that petitioner was entitled to a remedy as a matter of right, whether that remedy be known as abuse of process, abuse of power, or something else - there would be no magic in the name given to it - and that the court should not deny a remedy because the complaint did not fall into a specific category of actions. Co-counsel for respondents argued that this was a case in which Carswell may have suffered a wrong for which there is no

remedy. This, in effect, is what that court decided.

This Court will observe that there was no denial to Carswell of his constitutional right to due process - to a remedy - until tje court of first instance took the decision to sustain respondents' demurrer. It was at this moment that the denial of his constitutional right matured. The denial of a remedy under the special facts of this case raises a constitutional question per se. It is emphasized that Carswell had raised the issue of his right to a remedy in the court of first instance prior to its decision to sustain respondents' demurrer.

This Court will note from Appendixes C, D and and E that from the moment of first contact with Carswell respondents had determined that the septic system serving his residence was in malfunction - prior to any investigation or analysis of said system ! The outcome was predetermined from the start, from that first contact, with no notice, no hearing, no review, no appeal ! And Chapter 68 under which respondents purport to act makes the sole, subjective determination by the Administrative Authority (respondents) final and unreviewable !

Carswell filed a timely Petition for Ap-

peal in the Supreme Court of Virginia, which was denied after hearing Carswell's oral argument on the constitutional and other matters, on March 17, 1982.

It is this situation which is the basis for this petition for certiorari - a situation of a strikingly patent case of lack of due process which the Supreme Court of Virginia has chosen to ignore rahter than rectify.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. The Supreme Court of Virginia heard Petitioner's arguments on the constitutional issue relating to Section 11 of the Constitution of Virginia, which reads as follows:

> Section 11 - That no person shall be deprived of his life, liberty or property without due process of law.

and Section 1 of the Fourteenth Amendment to the United States Constitution, quoted herein under the heading "Constitutional Provision Involved". It denied his Petition for Appeal, stating merely that:

> Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

This judgment of the Supreme Court of Virginia is a final decision on the federal question

raised by Carswell in the court of first instance; it is binding on that lower state court and in effect and in fact confirms the judgment of that lower court and leaves Carswell without a remedy in a situation wherein his liberty and property continue to be in jeopardy because of actions taken by respondents under Chapter 68 of the Fairfax County Code (Appendix G). Chapter 68 was before the Supreme Court of Virginia, forming pages 67-80 of the Record on Appeal. The fact that Carswell was plaintiff in the court below should not affect requirements for due process of law - even plaintiffs are entitled to due process of law!

2. Chapter 68 of the Fairfax County Code (Appendix G) patently presents the followinf aspects and elements of unconstitutionality:

a. Article 1 is vague and fails to set out any standards, reasonable or otherwise, with respect to how determinations are to be made that an individual sewage disposal system is malfunctioning. No objective tests are established for that purpose. No criteria are set out for testing or evaluating the testing for the satisfactory operation of a septic system. The term "malfunction" is defined by reference to the "design function" of a system, but no standards

or criteria are set forth for determining this aspect (see Thompson v. Smith, infra). Under the Article the Administrative Authority is free to act as he wishes.

b. Chapter 68 of the Fairfax County Code is criminal in nature - see Section 68-1-26 quoted on page 4 hereof. This Court has been jealous to guard an accused's rights to procedural due process in such cases. Since this codes was enacted long after the septic system was installed on Carswell's property, the application of this section to Carswell raises an issue of ex post facto under Article I, Section 10 of the United States Constitution.

c. The activities and decisions of the Director of Health Services and his duly authorized representatives (respondents) are all entirely subjective in nature. The interested party who will be affected by these activities and decisions has no protection from this subjectiveness (see Thompson v. Smith, infra).

d. The determination made by the Administrative Authority (the Director of Health Services or his duly authorized representative - respondents in this case) is final and unreviewable.

e. This Chapter 68 has no provision

for (1) notice to the affected party; (2) a hearing for the affected party; (3) a review; or (4) judicial review. It is again emphasized that this Chapter is penal in nature, yet it patently fails to provide these four basic elements mentioned - not even one of them - of due process of law (see Assaid v. Roanoke, infra).

f. Finally, this Chapter 68 amounts to an unconstitutional delegation of legislative power to act without notice and hearing to an essentially administrative officer. It fails to declare the policy of the law and to fix the legal principles which are to control the discretion of the Director of Health Services and/or his duly authorized representatives (see Thompson v. Smith, infra).

3. This case, then, involves several constitutional issues of due process. The principle one is that of denial of a remedy to petitioner by the judicial system of Virginia, for the admitted wilfull and malicious abusive acts of respondents, government employees, for an unlawful purpose, interfering with petitioner's quiet enjoyment of his rights and property. Ancillary to this is the lack of due process in the procedures established under Chapter 68 of the Fairfax County Code, which is the basis for the authority under which respondents purport to

act. If respondents have so acted and continue to act under a code provision which is unconstitutional, their acts are unlawful and void, and Carswell's right to recover damages for such acts must be recognized by providing him a remedy in the judicial system of Virginia. In either case of unconstitutionality, Carswell is entitled to a remedy. The government of the Commonwealth of Virginia cannot escape its constitutional obligation to provide due process by saying simply, "there is no remedy"!

4. This Court will observe that Section 1 of the Fourteenth Amendment to the United States Constitution establishes a person's right to due process - and conversely it establishes the government's (the Commonwealth of Virginia in the present case) obligation to provide that due process. This constitutional guarantee of due process of law extends to any department of government, executive, legislative, or judicial, and to every governmental proceding which may interfere with personal or property rights, whether the proceding be legislative, judicial, administrative or executive (16A CJS Section 568 at page 556). Otherwise the due process clause would be a hollow phrase.

5. This Court has invariably struck down

laws that failed to provide the basic elements of due process of law, such as (1) notice, (2) hearing, (3) review, and (4) appeal - which is the situation with Chapter 68 of the Fairfax County Code. In Noval Goss et al. v. Eileen Lopez et al. (1975) 419 US 565, 42 Led2d 725, 95 S.Ct. 729, this Court, citing Mullane v. Central Hanover Trust Co. (1950) 339 US 306, 94 Led 865, 70 S.Ct. 652, as a case often invoked by later opinions, quotes that case as follows:

> . . . many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In Baldwin v. Hale (1864), 1 Wall 223, 233, 17 Led 531, it is stated "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (emphasis added)

In Yick Wo v. Hopkins, 118 US 356, 6. S.Ct. 1064, 30 Led 220, this Court dealt with the question of a delegation of police powers. An ordinance of the city and county of San Francisco provided that it was unlawful for a person to engage in the laundry business "without

having first obtained the consent of the board of supervisors . . . ". In holding the ordinance invalid this Court said:

> The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint... .
>
> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

It is interesting to consider the following Virginia cases, in which the Supreme Court of Virginia consistently struck down codes with the defects discussed above, as violative of both the Virginia and the United States Constitutions.

Violett's Heirs v. City Council of Alexandria (1896) 92 Va. 561, 23 S.E. 909, 31 LRA 382, 53 Am. St. Rep. 825, is a leading case with respect to due process under local statutes and codes. This case involved a local ordinance providing for assessment against land for street improvement, and for the method of evaluating the land. At page 913 (SE Reports) the

Supreme Court of Virginia stated:

> The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done.

And further on that court stated:

> All the authorities agree that "due process of law" requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property.

In the case of Assaid v. City of Roanoke (1942) 179 Va. 47, 18 S.E.2d 287, at 288 (S.E. Reports) the Supreme Court of Virginia quoted Mr. Justice Epes in Thompson v. Smith (1930) 155 Va. 367, 154 S.E.579, 71 ALR 604 as follows:

> It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency.

That court then went on to state :

> It is by this legal tape that the rights of the defendant are measured. When the tape is placed upon the ordinance in question it clearly appear (sic) that it violates Article 1, Section 11 of the Virginia Constitution, and the Fourteenth A-

> mendment to the Constitution of the United States, by reason of its failure to provide for notice and hearing, by undertaking to make the determination of the city manager final and unreviewable, and by not providing for a judicial review thereof. (emphasis added)

And that court then restated the following principle from Violett's Heirs v. City of Alexandria, supra:

> The legality of the ordinance is to be tested not by what has been done under it, but by what may, by its authority, be done.

6. Certiorari by this Court is necessary und under the peculiar circumstances of this case to prevent a patent and flagrant violation of the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which would result in a travesty on justice. In addition, a decision by this Court now could help avoid future litigation on this matter should Carswell be prosecuted under Secion 68-1-26 of the Fairfax County Code.

This Court's attention is again invited to the circumstances admitted by the demurrer in the underlying case:

The "duly authorized representatives" of the Director of Health Services, all officers, agents and employees of the Commonwealth of Vir-

ginia and/or Fairfax County, have acted intentionally wilfully and maliciously with an improper purpose, misusing and abusing the power and authority of their office to harass, vex and annoy Carswell, and their actions have been taken under a chapter of the county code that is patently unconstitutional for lack of due process because it does not provide for notice, hearing, review or appeal of the subjective determination made by such persons.

CONCLUSION

For the above stated reason petitioner, Robert M. Carswell, Jr., respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

Robert M. Carswell Jr.

Dated 5 July 1982

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